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No. 06-545

IN THE

Supreme Court of the United States

ECHOSTAR COMMUNICATIONS CORPORATION, *et al.*,
Petitioners,

v.

FOX BROADCASTING COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Circuit correctly concluded that petitioner EchoStar—which the court observed had violated "in every way imaginable" the statutory copyright license created by the Satellite Home Viewer Act—should be enjoined from retransmitting copyrighted distant network television programming pursuant to this license.

RULE 29.6 STATEMENT

Respondent Fox Broadcasting Company ("FOX") states that its parent corporation is News Corporation. News Corporation owns 100% of FOX's stock.

Respondent ABC Television Affiliates Association states that it is a non-profit trade association which has no publicly traded stock or parent corporation.

Respondent CBS Television Network Affiliates Association states that it is a non-profit trade association which has no publicly traded stock or parent corporation.

Respondent FBC Television Affiliates Association states that it is a non-profit trade association which has no publicly traded stock or parent corporation.

Respondent NBC Television Affiliates states that it is a non-profit trade association which has no publicly traded stock or parent corporation.

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BRIEF IN OPPOSITION

Respondents Fox Broadcasting Company ("FOX") and ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates ("Affiliate Associations") respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case. The petition does not meet any of the established criteria warranting certiorari. *See* S. Ct. Rule 10.

INTRODUCTION

This case concerns the statutory penalty for a satellite carrier that engages in a nationwide pattern or practice of violating a Congressionally created license to retransmit copyrighted programming broadcast by out-of-market (or

"distant") television stations. The decision below was unanimous, and no circuit judge voted for rehearing en banc. One other court of appeals addressed the issue presented in this case several years ago and reached the same decision as the Eleventh Circuit, also in a unanimous decision. Congress has twice reenacted the identical statutory language since that earlier ruling. There are no real "national ramifications" of the decision below, Pet. 13, given petitioner EchoStar's ability to continue providing network programming to over 96% of television households. And in any event, the Eleventh Circuit properly followed Congress's clear command that in the event of a pattern or practice of violating the limited statutory license granted to satellite carriers, the carrier would forfeit that license.

The District Court found, the Court of Appeals confirmed, and EchoStar does not contest in its petition, that EchoStar spent years flagrantly violating its statutory license to retransmit distant network signals. Given EchoStar's extended and extensive pattern of violating the license, the statute plainly requires that EchoStar be denied the benefit of that license. The court of appeals faithfully applied the terms of the statutory license and ordered the remedies Congress prescribed for such nationwide violations. The petition for certiorari should be denied.

COUNTERSTATEMENT

A. Statutory Background

It is a basic principle of copyright law that copyright holders—including television networks such as FOX and television stations such as those represented by the Affiliate Associations—have protected property rights in broadcast television programming. Congress has, however, amended the copyright laws to grant two limited statutory licenses to satellite carriers that allow them to retransmit television programming to their subscribers without obtaining the

copyright holders' permission. The first such statutory license—the one at issue in this case—relates to the retransmission of "distant network signals" by a satellite carrier. *See* 17 U.S.C. § 119. A distant network signal is one from a television station affiliated with a broadcast network (such as ABC, CBS, NBC, or FOX) that has been transmitted beyond that station's local viewing area.[1] The second limited statutory license relates to the retransmission of the signals of local network-affiliated stations within their own markets by a satellite carrier (referred to as "local-into-local" service). *See* 17 U.S.C. § 122.[2]

The terms of the statutory license to retransmit distant network signals are found in the Satellite Home Viewer Act of 1988 ("SHVA"), as amended by the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") and the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA") (collectively, the "Act"). The statutory license was not intended to allow satellite carriers to transmit distant network signals indiscriminately; it was designed to enable service only to those few subscribers who could not get network programming any other way. The license permits a satellite carrier to retransmit the copyrighted network programming contained in a distant signal to "persons who reside in unserved households"—essentially viewers who cannot receive an adequate over-the-air signal from their local network station. 17 U.S.C. § 119(a)(2)(B)(i), § 119(d)(10)(A)-(E); Pet. App. 5a-6a, 62a-63a (discussing statutory scheme in detail). The statutory license is a boon to

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[1] For example, someone who lives in Fort Lauderdale but receives an ABC, CBS, FOX, or NBC network station from New York City is receiving "distant network programming." *See* Pet. App. 2a, 47a.

[2] Thus, the subscriber living in Fort Lauderdale who receives the local ABC, CBS, FOX, or NBC network station is receiving "local-into-local programming."

satellite carriers, for it exempts them from having to negotiate copyright clearance with all parties (including the network and the television stations) with a copyright interest in the distant station's programming. *See* H.R. Rep. No. 108-634, at 2 (2004).[3]

Because Congress was concerned that satellite carriers might angle to provide distant network signals to subscribers other than those eligible to receive them, it included strict penalties for violations. The Act contemplates two categories of violations of the Section 119 license: individual violations and a "pattern or practice" of violations. 17 U.S.C. § 119(a)(7)(A)-(B).[4] An individual violation is the willful or repeated retransmission of a distant signal to an ineligible subscriber. A satellite carrier who engages in an individual violation is subject to the remedies provided in Sections 502-506 and 509 of the Copyright Act, which grant a court discretion to, among other things, issue a temporary or final injunction "on such terms as [the court] may deem reasonable to prevent or restrain infringement of a copyright" and to impose costs and attorneys' fees. *Id.* §§ 502, 505; *see id.* § 119(a)(7)(A).

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[3] Outside the Section 119 license to retransmit distant signals to "unserved households" and the Section 122 license to retransmit a station's signal into its own local market, copyright holders retain fully their rights in broadcast television programming as against satellite carriers.

[4] The Section 122 license contains virtually identical remedial provisions to those in the Section 119 license. *Id.* § 122(f). Those provisions "include[e] a 'pattern or practice' provision that *requires termination of the Section 122 statutory license* as to a particular satellite carrier if it engages in certain abuses of the license." Joint Explanatory Statement of the Comm. of Conference, H.R. Conf. Rep. No. 106-464, at 94 (1999) (emphasis added).

The second type of violation is a "pattern or practice" of violations. EchoStar's conduct fell within this category. A pattern or practice of violations occurs when "a satellite carrier engages in a willful or repeated pattern or practice of delivering a primary transmission made by a network station and embodying a performance or display of a work to subscribers who are not eligible to receive the transmission under this section." *Id.* § 119(a)(7)(B). The Act specifies both a mandatory and a discretionary remedy for a satellite carrier that engages in a pattern or practice of violating the Section 119 license. If a pattern or practice "has been carried out on a substantially nationwide basis, *the court shall order a permanent injunction* barring the secondary transmission by the satellite carrier, for private home viewing, of the primary transmissions of any primary network station affiliated with the same network, and *the court may order statutory damages* of not to exceed $250,000 for each 6-month period during which the pattern or practice was carried out." *Id.* § 119(a)(7)(B)(i) (emphases added).

The fact that a mandatory injunction is triggered when a satellite carrier engages in a pattern or practice of violating the Section 119 license comports with the care Congress took to craft this license without unduly trammeling the rights of copyright holders. Congress balanced competing interests in enacting the Section 119 license: it sought to provide network programming to the small number of households otherwise lacking access to it, and at the same time, sought to protect copyrights, preserve the system of network/affiliate programming distribution, and promote localism.[5] *See PrimeTime 24 Joint Venture* v. *National Broad. Co., Inc.*, 219 F.3d 92, 95 (2d Cir. 2000) (SHVA reflects "an effort to balance the networks' copyright interests with

[5] "Localism is the concept that consumers should be able to view their own local news, weather, emergency, and community-oriented programming." H.R. Rep. No. 108-660 at 7-8 n.4 (2004).

consumers' interests in receiving programming through satellites"); *ABC, Inc.* v. *PrimeTime 24*, 184 F.3d 348, 350-351 (4th Cir. 1999) (SHVA attempts "to reconcile competing interests" in "providing network television services to remote areas, protecting the networks' interest in their copyright material, and preserving the public interest in the maintenance of a system of local network affiliates"); *see also* H.R. Rep. No. 100-887(I), at 14 (1988); H.R. Rep. No. 100-887(II), at 19-20 (1998); Sen. Rep. No. 106-42, at 10-11 (1999); Joint Explanatory Statement of the Comm. of Conference, H.R. Conf. Rep. No. 106-464, at 91-92; H.R. Rep. No. 108-660, at 11.

B. Proceedings Below

1. The Lawsuit. In 1998, Respondents FOX and the Affiliate Associations sued EchoStar for violations of the Act, alleging that EchoStar had willfully and repeatedly exceeded the scope of its Section 119 license by providing distant network programming to households other than "unserved households." After a 10-day bench trial, the District Court found that EchoStar had for years been violating its statutory license to retransmit distant network programming. Pet. App. 74a-75a; *see* Pet. App. 47a-59a, 64a-67a (discussing history of EchoStar's noncompliance).

The Eleventh Circuit and District Court opinions discuss EchoStar's monumental failings in detail. The bottom line is this: EchoStar has for years supplied hundreds of thousands of ineligible households with distant network programming—and continues to do so to this day. The evidence presented at trial showed that over 457,000 (or 50.9%) of EchoStar's ABC distant network subscribers, over 481,000 (55.7%) of EchoStar's CBS distant network subscribers, over 383,000 (38.7%) of EchoStar's FOX distant network subscribers, and over 489,000 (56.4%) of EchoStar's NBC distant network subscribers are not eligible for those

distant network signals because they receive an acceptable over-the-air network signal. Pet. App. 52a-53a.

The District Court concluded that EchoStar's repeated violations were "clearly willful." Pet. App. 74a. However, since EchoStar had made changes to its sign-up procedures by the time of trial (*i.e.*, it may no longer have been substantially *increasing* the number of illegal subscribers already on its rolls), the District Court concluded that "no such pattern or practice currently exists which would warrant" the sanction of a permanent nationwide injunction. Pet. App. 76a.

2. The Eleventh Circuit's decision. The Eleventh Circuit affirmed all of the District Court's factual findings, including that EchoStar had illegally provided distant network programming to hundreds of thousands of households and that it had repeatedly—and knowingly—used sign-up mechanisms that did not limit subscribers to unserved households. Pet. App. 20a-32a.[6]

The Court of Appeals next held that the District Court erred in not entering the permanent injunction mandated by 17 U.S.C. § 119(a)(7)(B)(i), because the conclusion was "inescapable" that EchoStar had engaged in a pattern or practice of violations on a nationwide basis. Pet. App. 32a. As the Court of Appeals explained, "at no point from when EchoStar began offering distant network programming through January 2002 did it use a compliant method capable

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[6] The Court of Appeals reversed one minor conclusion of law (out of the "staggering" seventeen assignments of error that EchoStar had briefed, Pet. App. 21a) related to EchoStar's use of multiple vendors to determine prospective customer eligibility. *See* Pet. App. 31a. But even as to that issue, the Eleventh Circuit pointed out that "it would be difficult to conclude that [EchoStar] ha[d] satisfied its burden of proof" if its two vendors reached opposite conclusions. *Id.* at 27a.

of reliably assessing subscriber eligibility." Pet. App. 36a. It continued, "[i]f these findings do not describe a 'pattern or practice' of violations, we do not know what does." Pet. App. 38a.

The Court of Appeals also observed that "[a]s if the magnitude of its ineligible subscriber base were insufficiently disconcerting, we have found no indication that EchoStar was ever interested in complying with the Act." *Id.* Instead, the court discerned that EchoStar had a " 'pattern' and 'practice' " of violating the Act "in every way imaginable" and "at every turn." *Id.*; *see also* Pet. App. 19a n.22 (expressing "confiden[ce] that the record demonstrates that EchoStar knew what it was doing and knew it was not in compliance with the Act").

The Court of Appeals accordingly concluded that the District Court was required to enter the permanent injunction specified in the Act. The Eleventh Circuit looked to the "facially mandatory nature of the provision" and found that Congress had expressly removed courts' discretion to craft a lesser remedy upon a finding of a pattern or practice of violations. Pet. App. 39a. The court rejected EchoStar's reliance on *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944), explaining that in that case, the Court had relied on both ambiguous statutory language and legislative history suggesting that Congress had not intended to remove courts' traditional equitable discretion. *See* Pet. App. 39a (noting that the *Hecht* statute's catch-all remedy included "other order[s]," signaling "that Congress had not intended to remove court's traditional equitable discretion"). The Eleventh Circuit found no similar ambiguous language or legislative history in SHVA or SHVIA indicating that the remedial measure specified by Congress in Section 119 was anything but mandatory. The court also relied on Congress's use of both a mandatory remedy—the injunction—and a

discretionary remedy—damages—in the same provision to support its conclusion. Pet. App. 40a.[7]

EchoStar sought rehearing en banc from the panel's unanimous decision. The petition garnered no votes and was denied. *See* Pet. App. 86a. EchoStar then moved to stay issuance of the mandate in the Eleventh Circuit. The Court of Appeals denied the motion. *See* Order (Aug. 7, 2006). EchoStar then filed an application in this Court to recall and stay the mandate. *See* S. Ct. No. 06A198. Justice Thomas, the Circuit Justice for the Eleventh Circuit, denied the motion. This petition for certiorari followed.

REASONS FOR DENYING THE WRIT

The Eleventh Circuit did not "enter[] a decision in conflict with the decision of another United States court of appeals on the same important matter"; it did not "decide[] an important federal question in a way that conflicts with a decision by a state court of last resort"; and it did not "depart[] from the accepted and usual course of judicial proceedings, or sanction[] such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S. Ct. Rule 10(a). Nor did the Eleventh Circuit "decide[] an important

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[7] Contrary to EchoStar's assertions, *see* Pet. 9-10 n.5 & n.6, the Affiliate Associations have never argued that the Eleventh Circuit's mandate allowed anything other than a nationwide permanent injunction on all distant network programming. The Affiliate Associations informed the District Court on remand that *if* the court entered the proposed consent judgment and approved the settlement agreement stipulated to by EchoStar and the Affiliate Associations, then, in light of that settlement, the District Court could carve out the television stations represented by the Affiliate Associations from the required nationwide permanent injunction. The tentative settlement was negated when the District Court entered the permanent injunction. *See* Docket Entry 1019 (Oct. 20, 2006). The settlement was never operative or in effect.

question of federal law that has not been, but should be, settled by this Court, or [decide] an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). The petition should be denied.

I. THE PETITION IDENTIFIES NO CONFLICT WITH ANY DECISION OF ANY OTHER COURT OF APPEALS.

EchoStar concedes the lack of a circuit split. *See* Pet. 13. As well it should have; for the other court of appeals to have considered the statutory question at issue reached the same conclusion as the Eleventh Circuit. In *ABC, Inc.* v. *PrimeTime 24*, 184 F.3d 348 (4th Cir. 1999), a satellite carrier found to have engaged in a local pattern[8] of violating its Section 119 license argued that notwithstanding the facially mandatory nature of the injunction provision, district courts retained discretion to shape an injunction as they see fit. *Id.* at 354. The Fourth Circuit disagreed, unanimously holding that the Act "unequivocally commands that when a carrier engaged in a willful or repeated pattern of violations in a locality, the district court 'shall order' an injunction barring the transmission of network signals 'in that locality.' " *Id.* The court contrasted the discretionary nature of the ordinary copyright remedies Congress enacted to remedy individual violations, *see* 17 U.S.C. § 119(a)(7)(A), and took special note of Congress's "deliberate selection of an alternate, stricter remedy for the more serious pattern or practice cases." 184 F.3d at 354-355. In making that choice, Congress " 'made its desire plain' to limit the district court's

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[8] The Act provides parallel penalties for local and nationwide "pattern or practice" violations. Local violations result in a local permanent injunction. Nationwide violations result in a nationwide permanent injunction. *See* 17 U.S.C. §§ 119(a)(7)(B)(ii) (local injunction), 119(a)(7)(B)(i) (nationwide injunction).

discretion in these circumstances." *Id.* at 355 (citing *Hecht*, 321 U.S. at 330).[9]

Far from a circuit split, therefore, two courts of appeals unanimously have construed this statutory language the same way. Moreover, since the Fourth Circuit ruled that injunctive relief is mandatory for a pattern or practice of violations, Congress has twice re-enacted the identical statutory language. *See* Satellite Home Viewer Improvement Act, Pub. L. 106-113, 113 Stat. 1501 (1999); Satellite Home Viewer Extension and Reauthorization Act, Pub. L. 108-447, 118 Stat. 2809 (2004). "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts the statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). Even EchoStar itself recognizes this principle in its petition, stating that "legislatures are presumed to act with knowledge of legal principles in court decisions." Pet. 15 n.11.[10]

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[9] Just as EchoStar does here, the satellite carrier in that case had argued that the injunction should not be entered because an injunction would prevent it from transmitting network signals to some *eligible* unserved households. *Id.* The Fourth Circuit rejected that argument, observing that the Act "was a compromise among a number of competing interests, and the statutory text defines the terms of the legislative deal." *Id.* The Act defines a statutorily created license to broadcast to a limited range of households, and specifies remedies for infringement of television copyrights beyond that license. And "where a carrier flouts the terms of its license in a willful and widespread manner, the penalty is a strict one"—consistent with the Act's underlying purposes. *Id.*

[10] The Conference Report for the reenactment in 1999 specifically referenced, and endorsed, prior judicial construction of the Act. *See* Joint Explanatory Statement of the Comm. of Conference, H.R. Conf. Rep. No. 106-464, at 95 ("[T]he procedural and remedial provisions of section 119, *which have already been interpreted by the courts*, are being extended without change.") (emphasis added).

II. THE PETITION DOES NOT PRESENT AN ISSUE OF NATIONAL IMPORTANCE.

EchoStar's rhetoric about the national importance of this case is greatly exaggerated.[11] To begin with, EchoStar repeatedly asserts that the injunction in this case will prevent hundreds of thousands of Americans from watching network programming in their homes. *See* Pet. 10, 11. This is not true in at least three ways.

First, EchoStar's hundreds of thousands of illegal subscribers cannot possibly provide a basis for exercise of this Court's certiorari jurisdiction; they were never eligible for distant network programming in the first instance. Second, EchoStar's claims here are wholly inconsistent with its assurances to its customers and to the securities markets. Most notably, EchoStar neglects to mention in the petition that it offers local-into-local service—which will not be affected by the injunction—to more than 96% of all households in the United States. As EchoStar has recently stated in a press release:

> EchoStar currently offers local ABC, NBC, CBS and Fox channels by satellite in 170 markets, serving over 96 percent of the U.S. population. These local networks are not part of the court injunction; therefore, a majority of our distant network customers will be able to watch their local network channels without interruption. In the limited areas where local channels are not available by satellite, we also

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[11] The sole case EchoStar cites in support of its "national ramifications" argument is *United States* v. *Donovan*, 429 U.S. 413, 422 (1977), Pet. 13, which involved interpretation of the federal wiretap statute. A magnitude of difference exists between the ramifications of an interpretation of the federal wiretap statute—which district courts must interpret in connection with every federal wiretap issued—and an interpretation of SHVA.

> intend to protect our customers by providing free off-air antennas and other alternatives.[12]

The overwhelming majority of EchoStar's subscribers thus will be able to continue to receive network programming *from EchoStar itself*. Third, EchoStar's own petition points out another serious flaw in EchoStar's "the-sky-is-falling" argument: many, if not all, of EchoStar's affected subscribers can retain network programming by switching to cable or DIRECTV (another satellite carrier offering distant network service), or by using a television antenna to receive programming over the air. *See* Pet. 12 & n.8.

In the end, this decision is of importance only to the parties—not the Nation. What EchoStar has lost is the special right to retransmit copyrighted material without seeking the permission of the relevant copyright holders. It remains free to negotiate a private license for the retransmission of distant network signals from those copyright holders. While the Section 119 license applies "[i]n the absence of a freely-negotiated agreement," EchoStar is "always free to enter into private negotiations with copyright owners and to compensate them for the use of their content under agreed-upon terms." H.R. Rep. No. 108-660, at 8; *see, e.g.*, *ABC, Inc.*, 184 F.3d at 355 ("The district court's injunction hardly brings matters to a standstill. PrimeTime and ABC remain free to negotiate a private arrangement for the transmission of network signals.").

EchoStar's assertion that this case presents the Supreme Court with its "only opportunity" to address the Act's remedial provisions, Pet. 14, undercuts any claim to the recurring legal significance of the issues. So does Congress's

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[12] EchoStar Web Site, *News Release: "Statement in Response to Florida Court Ruling"* (Oct. 23, 2006), *available at* http://www.dishnetwork.com/content/aboutus/presskit/distantlocals/index.shtml.

recent amendment to the Act limiting future provision of distant network signals where local-into-local signals are available.[13] *See* 47 U.S.C. § 339; H.R. Rep. No. 108-634, at 17-18.[14]

III. THE DECISION BELOW CORRECTLY INTERPRETED THE ACT'S INJUNCTIVE PROVISION.

EchoStar does not contest the liability finding against it, but only whether the Act's mandatory language—directing that the district court "shall order a permanent injunction"—really means what it says. EchoStar raises two principal arguments in support of its contention that such an injunction need not have issued below. Neither has merit, and certainly neither warrants the exercise of this Court's certiorari jurisdiction.

1. EchoStar first asserts that the Eleventh Circuit's decision is "in tension with this Court's precedent[s]" in which a federal statute eliminates a district court's discretion to fashion the injunctive relief that it sees fit. Pet. 14. Not so. Each of the cases EchoStar cites supports the decision below. For example, both *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 399 (1946), and *Hecht*, 321 U.S. at 322,

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[13] SHVERA amended the Act to require satellite carriers to stop signing up new subscribers to distant signal service in a market once the carrier begins providing local-into-local service in that market. *See* 47 U.S.C. § 339; H.R. Rep. No. 108-634, at 17-18.

[14] EchoStar's reference to DIRECTV's settlement agreement with some networks is misguided. Pet. 13 n.9. Only a private copyright license or the Section 119 license grants DIRECTV the right to retransmit distant network signals. A television network cannot bargain away the rights of third-party copyright owners, such as sports leagues (*e.g.*, the National Football League), movie studios (*e.g.*, Universal Studios), and syndicators (*e.g.*, King World), which own the copyrights in programming that DIRECTV retransmits via distant signals.

involved interpretation of a statute authorizing a district court upon proper showing to grant "a permanent or temporary injunction, restraining order, *or other order*." (Emphasis added). As the Court held in both cases, the "or other order" language suggested that Congress did not intend to require that an injunction issue in all cases.[15]

In *Miller* v. *French*, 530 U.S. 327 (2000), another case cited by EchoStar, the Court held that a statute containing an automatic stay provision did not permit district courts to exercise equitable jurisdiction to suspend operation of the stay. The Court stated that it would not lightly assume that Congress meant to restrict the equitable powers of the federal courts, but emphasized that "where Congress has made its intent clear, 'we must give effect to that intent.' " *Id.* at 336 (quoting *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 215 (1962)); *see also id.* at 337 (statute providing that a motion to terminate injunctive relief " '*shall* operate as a stay' * * * indicates that the stay is *mandatory*") (emphases added). So too here, where Congress made its intent clear by enacting a statute commanding that a district court "shall order a permanent injunction" once a threshold finding of a pattern of violations is made. Any interpretation other than that of the Eleventh Circuit below "would subvert the plain meaning of the statute, making its mandatory language merely permissive." *Id.* at 337.[16]

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[15] The statute at issue in those cases authorized equitable relief even for good faith mistakes. *E.g.*, *Hecht*, 321 U.S. at 325. The statute here does not include innocent violations within its remedial authorization; it encompasses only "willful or repeated" violations, and only a "pattern or practice" of local or national violations triggers the mandatory injunction.

[16] EchoStar's citation to *eBay Inc.* v. *MercExchange, LLC*, 126 S. Ct. 1837, 1840 (2006) is similarly off-base. *See* Pet. 15. In stark contrast to the unambiguous and mandatory command of the Section 119 license, the Patent Act provision at issue in *eBay*

EchoStar asserts that characterizing the mandatory injunction provision "as containing 'no ambiguous language' is out of step with this Court's precedents," Pet. 15-16 (internal citation omitted), but it points to no language in the statute that admits to multiple interpretations.[17] The Eleventh Circuit's decision comports with the normal and consistent understanding of Congress's use of the term "shall." As this Court has repeatedly noted, "[t]he word 'shall' is ordinarily '[t]he language of command.'" *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947) (quoting *Escoe* v. *Zerbst*, 295 U.S. 490, 493 (1935)). In other words, the term "shall" in a statute "normally creates an obligation impervious to judicial discretion." *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). EchoStar's mischaracterizations of *Califano* v. *Yamasaki*, 442 U.S. 682, 693 n.9 (1979), and *Hecht*, 321 U.S. at 327-328, are not to the contrary. *See* Pet. 16.

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expressly provides that injunctions "may" issue "in accordance with the principles of equity." 35 U.S.C. § 283. The *eBay* Court yet again emphasized that the term "may" is properly interpreted to encompass discretion, in sharp contrast to the term "shall." The Eleventh Circuit therefore correctly concluded that *eBay* did not affect its holding. *See* Pet. App. 40a n.32.

[17] Because Section 119 orders a district court to grant a permanent injunction, EchoStar's citations to *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 544-545 (1987) and *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 314 (1982) are unhelpful to its quest to create a conflict with past Supreme Court precedent. Pet. 14, 19-20. In those cases, the Court was reviewing lower court decisions to remedy technical violations of statutes by granting injunctive relief—in the context of statutes that provided no direction on appropriate relief for the type of violation. *Amoco Prod. Co.*, 480 U.S. at 544; *Weinberger*, 456 U.S. at 311-314. Here, by contrast, Section 119's command to the District Court could not be plainer.

EchoStar also criticizes the Eleventh Circuit for looking to the juxtaposition of the statutory command that the district court "shall" order an injunction with the discretionary option that it "may" order damages. Pet. 16; *see* Pet. App. 40a. But this Court has made precisely that sort of comparison in interpreting federal statutes. In *Anderson*, 329 U.S. at 485, this Court explained that when one provision "uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory." *See also Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005) (noting that "[t]he word 'may' customarily connotes discretion" and that "[t]hat connotation is particularly apt where, as here, 'may' is used in contraposition to the word 'shall' ").

Nor does EchoStar's attempt to invoke the protections for "good faith mistakes" aid its cause. *See* Pet. 17.[18] Given the sheer number of pages the courts below dedicated to detailing the numerous ways in which EchoStar for years deliberately and willfully violated the Act, EchoStar's reference to good-faith mistakes does not pass the straight-face test. *See* Pet. App. 10a-20a, 36a-38a, 47a-59a, 64a-75a. EchoStar has failed to disconnect more than 258,000 subscribers signed up under one method, despite having known since 1999 that they are ineligible and having promised the District Court under oath that they would be terminated. Pet. App. 56a-58a. EchoStar has failed to

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[18] An injunction is triggered when a satellite carrier engages in a "willful or repeated" pattern of violations. The Committee Report accompanying SHVA indicates that Congress did not believe a satellite carrier's conduct rose to the level of "willful or repeated" so as to trigger the injunctive remedy until more than 20% of the carrier's subscribers were ineligible. *See* H.R. Rep. No. 100-887(I), at 19. That cushion was intended to protect carriers from being enjoined for good-faith mistakes. *Id.* Once a carrier passes the 20% threshold—as here, by a mile—the good-faith presumption disappears.

disconnect any of the more than 630,000 subscribers who it has known since 1999 to be ineligible. Pet. App. 57a. In order to increase the number of purportedly unserved households, EchoStar has manipulated broadcast coverage areas to appear smaller—and then authorized its agents to ignore even the smaller coverage areas. Pet. App. 49a-50a. EchoStar has ignored the Federal Communication Commission's "detailed 'cookbook' " governing how to determine eligible households. Pet. App. 50a-52a, 65a-66a. These were not "good-faith mistakes." They were deliberate and rampant.

2. EchoStar also argues that the Eleventh Circuit should not have applied the remedy required by the Act's pattern or practice provision because by the time the District Court rendered its opinion, EchoStar's sign-up procedures no longer violated the Act. Wrong again. To be clear, EchoStar's violations of the Act had by no means ceased even by that time; it was violating the Act hundreds of thousands of times a day by retransmitting distant network programming to ineligible subscribers. All that had changed by the time of the District Court decision was that EchoStar's procedures for signing up new subscribers may have come closer to complying with the Act's requirements.

The Act states that if a pattern or practice "*has been carried out* on a substantially nationwide basis," a nationwide injunction shall issue. 17 U.S.C. § 119(a)(7)(B)(i). The Eleventh Circuit properly read the injunction requirement to apply whenever a pattern or practice "has been carried out"—and not to require, as EchoStar would have it, that a pattern or practice "is being carried out" at the very time the court decision issues. EchoStar's verb-tense argument overlooks the statute's condition precedent structure (*if* a carrier engages in a practice, *then* an injunction shall issue), which requires that the condition have occurred—but need not be continuing to occur—before the injunction is triggered. And the Eleventh Circuit properly recognized the

deep illogic of EchoStar's semantics: if EchoStar were correct, then "so long as a satellite carrier ceases (most of) its illegal activity, presumably anytime before the close of trial," it would not be subject to the injunctive penalty mandated by the statute. Pet. App. 34a. Nothing in the statute suggests that Congress sought to "impos[e] an obligation on the networks to identify violations, bring suit, conduct discovery, and complete a full trial, all before the satellite carrier decides to become SHVA compliant." *Id.*

Finally, the relief EchoStar seeks confirms the petition's most fundamental flaw. EchoStar is seeking certiorari because it wants the Court to interpret the mandatory injunction provision for patterns of violations as identical to—and thus redundant to—the discretionary injunction provision for individual violations. But it is a settled rule of statutory construction that "courts should disfavor interpretations of statutes that render language superfluous." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992); *see also Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (" 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant' ") (quotation omitted). EchoStar seeks certiorari to create just that impermissible redundancy.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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